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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re:  
HECTOR PEREZ,  
Debtor.

Case No. 02-52943-MM  
Chapter 13

**MEMORANDUM DECISION AND  
ORDER THEREON**

**INTRODUCTION**

This matter comes before the court on the objection of creditor Sears, Roebuck and Co. to confirmation of the debtor's Chapter 13 plan based on lack of good faith. For the reasons set forth, Sears' objection is overruled, and the plan is confirmed.

**FACTUAL BACKGROUND**

Hector Perez commenced this Chapter 13 case on May 28, 2002. He had not previously consulted with bankruptcy counsel. The petition appears to have been precipitated by a reduction in the amount of workers' compensation payments that Perez had been receiving since March 2001 as a result of a work-related lower back injury. Perez was disabled and received workers' compensation payments of approximately \$2,100 per month until May 2002, at which time the payments were abruptly reduced to approximately \$700 per month. Later, the payments were adjusted to approximately \$900 per month. Perez settled a claim against his former employer in October 2002 for ongoing medical expenses during

1 his lifetime, foregoing a lump sum cash settlement. Having undergone rehabilitation training, the debtor  
2 is now qualified for employment as a computer technician or an office clerical worker. As of the time  
3 of the evidentiary hearing in this matter, he had obtained part-time employment for approximately \$600  
4 per month.

5         Perez obtained a Mastercard credit card from Sears in 1998. His pattern of usage of the credit  
6 card prior to the filing of the bankruptcy petition was as follows. Perez maintained a zero or small  
7 balance on the card account throughout 2001. Commencing March 2002 through the petition date, Perez  
8 incurred total charges exceeding \$8,000. Sears asserts a claim in the amount of \$9,488.02. Mrs. Perez,  
9 who is now separated from the debtor, was also an authorized user of the credit card. The purchases in  
10 March 2002 consisted of auto repairs, new tires, clothing and foundations, kitchen and bath linens, a bed,  
11 a car stereo, a digital personal assistant, meals, and other items the debtor could not recall. Perez also  
12 took a cash advance in the amount of \$1,800 to pay his children's medical bills. Perez testified that the  
13 purchases did not include gifts to family members. Except for the car stereo and digital personal  
14 assistant, the purchases in question were primarily for personal and household use. Perez testified that  
15 a cell phone that he purchased using the Sears Mastercard was necessary because he was frequently  
16 absent from the house to attend medical appointments throughout the Bay Area. At the time Perez  
17 incurred the charges on the Sears Mastercard, his monthly expenditures were approximately \$700.

18         The proposed Chapter 13 plan will pay allowed claims of secured creditors plus interest and  
19 contemplates a distribution of five percent to unsecured creditors. The proposed plan provides that the  
20 debtor will make monthly payments of \$100 to the Trustee. The term of the plan is not apparent from  
21 its face. The debtor scheduled assets of \$11,500, all of which are exempt, secured claims of \$3,800, and  
22 unsecured claims of \$21,600. In the two years preceding the petition, the debtor earned an annual  
23 income of \$30,000 to \$35,000. His Schedule I - Current Income of Individual Debtors reflects monthly  
24 income of \$1,000 from workers' compensation payments. His Schedule J - Current Expenditures of  
25 Individual Debtors reflects monthly expenses of \$899, which do not include any extraordinary  
26 expenditures.

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**LEGAL DISCUSSION**

**I. The Debtor's Plan Was Proposed in Good Faith**

Section 1325(a)(3) of the Bankruptcy Code provides that the court shall confirm a plan if it has been proposed in good faith and not by any means forbidden by law. The debtor has the burden to establish good faith. In re Warren, 89 B.R. 87, 93 (B.A.P. 9<sup>th</sup> Cir. 1988). To determine whether the plan is proposed in good faith, the court must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed his Chapter 13 plan in an inequitable manner. In re Goeb, 675 F.2d 1386, 1390 (9<sup>th</sup> Cir. 1982). The Bankruptcy Appellate Panel has adopted a non-exclusive list of factors that are relevant to the court's consideration in determining good faith on a case by case basis. See Warren, 89 B.R. at 93. The only factor that Sears has addressed and appears to base its objection is that the credit card debt to Sears allegedly would be nondischargeable in a Chapter 7 case. However, it would constitute error to rely exclusively on only one factor. In re Ho, 274 B.R. 867, 876-77 (B.A.P. 9<sup>th</sup> Cir. 2002). The court must make its good faith determination in light of all militating factors and the totality of the circumstances. Goeb, 675 F.2d at 1390-91. Having conducted an evidentiary hearing and having considered the totality of the circumstances, the court concludes that the following factors are most compelling to its finding of good faith under the circumstances of this case.

A. The amount of the proposed payments and the amounts of the debtor's surplus.

The proposed plan provides for a five percent distribution to unsecured creditors, including Sears. This is not so nominal a distribution as to be inequitable in view of the debtor's available assets and income, which are limited. The debtor will not realize a surplus in excess of his modest expenditures and his Chapter 13 plan payments. This factor weighs in favor of confirmation of the debtor's proposed plan.

B. The debtor's employment history, ability to earn, and likelihood of future increases in income.

The debtor was previously employed by Pepsi Cola and earning \$30,000 to \$35,000 per year

1 prior to his injury. He is currently disabled. Although he has received rehabilitation training, he is new  
2 to his field and inexperienced. As of the time of the evidentiary hearing, the debtor had just obtained  
3 employment on a part-time basis for \$600 per month. Although the debtor could earn \$1,500 per month  
4 if employed in his current position on a full-time basis, it is speculative to project that he would be able  
5 readily to obtain employment at capacity in an economic downturn. While future increases in income  
6 are a possibility, it does not appear to be imminent. It does not appear to the court that the debtor is  
7 trying to discharge a sizable credit card obligation while he has the ability to earn a significant income  
8 in the future. This factor weighs in favor of the debtor.

9  
10 C. The probable or expected duration of the plan.

11 While the plan term is not apparent from its face, the minimum term is three years. See 11  
12 U.S.C. § 1325(b)(1)(B). Unsecured creditors would not receive more in a Chapter 7 proceeding. This  
13 factor is neutral to the court's analysis of good faith.

14  
15 D. The accuracy of the plan's statements of the debts, expenses and percentage of repayment  
16 of unsecured debt, and whether any inaccuracies are an attempt to mislead the court.

17 There is no evidence that the debtor's plan or bankruptcy schedules are inaccurate in any manner.  
18 The debtor's Schedule J - Current Expenditures of Individual Debtors does not appear to be overstated  
19 or to include any extraordinary expenditures that are unwarranted. This factor weighs in favor of the  
20 debtor.

21  
22 E. The type of debt sought to be discharged and whether any such debt is nondischargeable  
23 in Chapter 7.

24 By its objection to confirmation, Sears suggests that the debtor's credit card debt to Sears would  
25 be nondischargeable in a Chapter 7 proceeding based on fraud. For a debt to be nondischargeable  
26 pursuant to § 523(a)(2), the creditor must show that the debtor made the representations, at the time he  
27 knew they were false, he made them with the intention and purpose of deceiving the creditor, the creditor  
28 justifiably relied on the representations, and the creditor sustained damages a proximate result of the

1 representations having been made. In re Anastas, 94 F.3d 1280, 1284 (9<sup>th</sup> Cir. 1996). In credit card  
2 cases, courts consider a list of non-exclusive factors to infer the debtor's fraudulent intent not to repay.  
3 In re Eashai, 87 F.3d 1082, 1087-88 (9<sup>th</sup> Cir. 1996); In re Dougherty, 84 B.R. 653, 657 (B.A.P. 9<sup>th</sup> Cir.  
4 1988). A consideration of the Dougherty factors leads the court to conclude that the debtor did not have  
5 the requisite intent to defraud Sears.

6  
7 1. The length of time between the charge made and the filing of the bankruptcy.

8 Perez incurred the charges on his Sears Mastercard over a five month period, which is not a short span.  
9 The vast majority of the debt was incurred in excess of sixty days prior to the petition date long before  
10 the debtor considered filing for bankruptcy protection. Activity on the account in fact slowed beginning  
11 in early April 2002 until the petition was filed. This factor favors the debtor.

12  
13 2. Whether or not an attorney has been consulted concerning the filing of  
14 bankruptcy before the charges were made. The debtor testified credibly that he did not consult  
15 bankruptcy counsel until May 2002 when his workers' compensation payments were reduced. He also  
16 testified that he did not discuss a bankruptcy filing with the attorney handling the claim against his  
17 former employer. This factor favors the debtor.

18  
19 3. The number of charges made. In March and early April 2002, the debtor was  
20 using his Sears Mastercard almost daily or every few days. From early April through May 2002, activity  
21 on the account slowed markedly, however. During the ninety days before the petition, Sears booked  
22 sixty-four separate transactions on the debtor's account, including credits for returned merchandise. This  
23 factor favors the creditor.

24  
25 4. The amount of the charges. From March 2002 to the petition date, the debtor  
26 incurred in excess of \$8,000 on his Sears Mastercard. While many of these charges were for  
27 unsubstantial amounts not exceeding one hundred dollars, they reflect an aberration from his prior usage.  
28 This factor favors the creditor.

1                   5.     The financial condition of the debtor at the time the charge were made. In March  
2 and April 2002 when most of the charges were incurred, the debtor was receiving monthly workers'  
3 compensation payments of \$2,100, which was sufficient to pay for his expenses of \$700. He also was  
4 not aware that the amounts of his payments would be reduced. This factor favors the debtor.

5  
6                   6.     Whether the charges were above the credit limit of the account. The debtor's  
7 aggregate charges on his Sears Mastercard did not exceed the credit limit of \$9,500 on the account. This  
8 factor favors the debtor.

9  
10                  7.     Whether the debtor made multiple charges on the same day. On fifteen separate  
11 occasions, the debtor made multiple charges on the same day during March and April 2002. This factor  
12 perhaps favors the creditor.

13  
14                  8.     Whether or not the debtor was employed. While the debtor was not employed  
15 at the time the charges were incurred, he was receiving workers' compensation payments of \$2,100 per  
16 month. His income was sufficient to pay at least the minimum payment required by Sears. He was also  
17 pursuing vocational rehabilitation training in preparation to re-enter the work force. This factor is neutral  
18 to the court's analysis.

19  
20                  9.     The debtor's prospects for employment. Following his injury which resulted in  
21 his disability, the debtor underwent vocational rehabilitation and received training as a computer  
22 technician. As a result, his prospects for employment appeared promising at the time the subject charges  
23 were incurred. This factor favors the debtor.

24  
25                  10.    Financial sophistication of the debtor. The record does not support a finding that  
26 the debtor is financially sophisticated. This factor favors the debtor.

1           11.     Whether there was a sudden change in the debtor's buying habits. While there  
2 is no evidence of the debtor's customary buying habits, it appears that the debtor's usage of the credit  
3 card issued by Sears did change significantly during the ninety-day period immediately preceding the  
4 petition date. While he was undergoing rehabilitation, the debtor incurred significantly more charges  
5 on the account than had been his prior practice. This factor probably favors the creditor.

6  
7           12.     Whether the purchases were made for luxuries or necessities. While numerous,  
8 the charges incurred on the debtor's Sears Mastercard were rarely for luxury items. They consisted of  
9 auto repairs, new tires, clothing and foundations, household supplies, kitchen and bath linens, and a bed.  
10 With the exception of the car stereo and the digital personal assistant, the purchases were not  
11 extraordinary and generally were for personal or household use. This factor favors the debtor.

12  
13           On balance, the court finds that consideration of the Dougherty factors leads to the conclusion  
14 that the debtor did not have the requisite fraudulent intent to hold the debt to Sears to be  
15 nondischargeable. The court is not limited to the foregoing list of factors, however. In re Ettell, 188  
16 F.3d 1141, 1145 (9<sup>th</sup> Cir. 1999). The central inquiry is whether the cardholder lacked an intent to repay  
17 at the time he made the charge. Anastas, 94 F.3d at 1285; In re Kong, 239 B.R. 815, 821 (B.A.P. 9<sup>th</sup> Cir.  
18 1999). The representation made by the cardholder in a credit card transaction is not that he has the  
19 ability to pay; it is that he has the intention to pay. Anastas, 94 F.3d at 1285. The debtor testified that  
20 at the time of the charges he intended to repay them and had the ability to repay them, and his testimony  
21 is credible. The court need not reach the other elements of § 523(a)(2). See Eashai, 87 F.3d at 1088  
22 (creditor must also prove other elements of common law fraud). Because the debtor did not have the  
23 requisite intent, the debt to Sears would be discharged in a Chapter 7 case. This factor favors the debtor  
24 on confirmation.

25  
26           F.     The existence of special circumstances such as inordinate medical expenses.

27           The debtor is disabled and has not worked steadily since March 2001. While he has inordinate  
28 medical expenses associated with a work-related injury, they are covered under a settlement with his

1 former employer. However, his ability to earn income at historical levels has been impaired by his  
2 disability. He is also unable to procure full-time employment at this time. This factor weighs in favor  
3 of the debtor.

4  
5 G. The frequency with which the debtor has sought relief under the Bankruptcy Code.

6 A debtor's history of filings and dismissals is relevant. In re Eisen, 14 F.3d 469, 470 (9<sup>th</sup> Cir.  
7 1993); In re Nash, 765 F.2d 1410, 1415 (9<sup>th</sup> Cir. 1985). There is no evidence in the record that the debtor  
8 has sought bankruptcy relief prior to filing this case. This factor weighs in favor of confirmation of the  
9 debtor's plan.

10  
11 H. The motivation of the debtor in seeking Chapter 13 relief.

12 A good faith test should examine the intentions of the debtor and the legal effect of the  
13 confirmation of a Chapter 13 plan in light of the spirit and purposes of Chapter 13. Warren, 89 B.R. at  
14 93 (citing In re Chinichian, 784 F.2d 1440, 1444 (9<sup>th</sup> Cir. 1986). The debtor testified that he has been  
15 disabled since March 2001, and there was an unexpected reduction in the amount of his workers'  
16 compensation payments. The debtor's testimony is credible. He has re-tooled his skills and pursued re-  
17 employment. Unsecured creditors would receive more under the plan than in a Chapter 7 liquidation.  
18 The purposes of Chapter 13 are served by the confirmation of the debtor's proposed plan. This factor  
19 favors the debtor.

20  
21 I. The burden which the plan's administration would place upon the trustee.

22 \_\_\_\_\_ There is no evidence that the administration of the debtor's proposed plan would be more  
23 burdensome on the Trustee than any other Chapter 13 plan. This factor is neutral to the court's analysis.

24  
25 **II. The Disposable Income Test Is Satisfied**

26 A finding of good faith does not conclude the court's inquiry. Section 1325(b)(1)(B) provides  
27 that if there is an objection to confirmation, the court may not approve the plan unless it finds that, as  
28 of the effective date of the plan, the plan provides that all of the debtor's projected disposable income



1 for the three-year period beginning on the date that the first payment is due will be applied to make  
2 payments under the plan. This section requires the distribution of disposable income to the greatest  
3 extent available. Warren, 89 B.R. at 94. The best effort requirement of § 1325(b)(1)(B) is separate and  
4 distinct from the good faith requirement of § 1325(a)(3). Warren, 89 B.R. at 95.

5 \_\_\_\_\_ The objecting creditor has the initial burden of producing satisfactory evidence to support the  
6 contention that the debtor is not applying all of his projected disposable income to the plan payments.  
7 In re Heath, 182 B.R. 557, 560-61 (B.A.P. 9<sup>th</sup> Cir. 1995). Sears has presented no evidence related to this  
8 issue and has not satisfied its burden sufficient to shift the burden upon the debtor. Instead, the record  
9 reflects that the debtor has no surplus in excess of his plan payments and budgeted expenditures. The  
10 disposable income test is satisfied.

#### 11 12 CONCLUSION

13 Based on the foregoing findings, the court overrules the objection by Sears and confirms the  
14 debtor's proposed Chapter 13 plan.

15 Good cause appearing, IT IS SO ORDERED.

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18 DATED: \_\_\_\_\_

19 UNITED STATES BANKRUPTCY JUDGE  
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Case No. 02-52943-MM

**UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**CERTIFICATE OF SERVICE**

I, the undersigned, a regularly appointed and qualified Clerk in the office of the Bankruptcy Judges of the United States Bankruptcy Court for the Northern District of California, San Jose, California hereby certify:

That I am familiar with the method by which items to be dispatched in official mail from the Clerk's Office of the United States Bankruptcy Court in San Jose, California processed on a daily basis: all such items are placed in a designated bin in the Clerk's office in a sealed envelope bearing the address of the addressee, from which they are collected at least daily, franked, and deposited in the United States Mail, postage pre-paid, by the staff of the Clerk's Office of the Court;

That, in the performance of my duties, on the date set forth below, I served the **MEMORANDUM DECISION AND ORDER THEREON** in the above case on each party listed below by depositing a copy of that document in a sealed envelope, addressed as set forth, in the designated collection bin for franking, and mailing:

RICHARD B MCLAUGHLIN  
119 CAYUGA STREET  
SALINAS CA 93901

JAMES G SCHWARTZ  
DAVID W THOMPSON  
LAW OFFICES OF JAMES G SCHWARZ  
7901 STONERIDGE DRIVE SUITE 401  
PLEASANTON CA 94588

In addition, I am familiar with the Court's agreed procedure for service on the United States Trustee, by which a copy of any document to be served on that agency is left in a designated bin in the Office of the Clerk, which bin is collected on a daily basis by the United States Trustee's representative. In addition to placing the above envelopes in the distribution bin for mailing, I placed a copy of the **MEMORANDUM DECISION AND ORDER THEREON** in the United States Trustee's collection bin on the below date.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on:

\_\_\_\_\_  
Clerk